

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7044

Petition of City of Burlington, d/b/a Burlington)
Telecom, for a certificate of public good to)
operate a cable television system in the City of)
Burlington, Vermont (In Re: Amended Petition)
to amend Condition No. 17 of CPG related to)
completion of system build-out and to grant)
temporary relief from limitation in Condition)
No. 60 of CPG on financing operations))

Order entered: 3/1/2010

PROCEDURAL RULINGS

In this Order, I (i) deny the motion of Comcast of Connecticut/Georgia/Massachusetts/New Hampshire/New York/North Carolina/Virginia/ Vermont, LLC, d/b/a Comcast ("Comcast"), to revise the schedule, (ii) clarify that the parties' initial prefiled testimony need not address the issue of penalties for non-compliance, and (iii) set a deadline of March 10, 2010, for responses to the motion of the Department of Public Service ("Department") to compel discovery.

Ruling on Comcast's Motion to Revise Schedule

Comcast filed a motion to revise the schedule related to the Amended Petition of City of Burlington, d/b/a Burlington Telecom ("Burlington Telecom"), in this docket on December 17, 2009. Comcast proposed that the schedule be revised "to address the issues in this proceeding in two phases, with the first phase limited to the extent of compliance or noncompliance of Burlington Telecom" with its Certificate of Public Good ("CPG") "and any associated noncompliance-related remedies and sanctions; and the second phase addressing BT's specific proposals for operating prospectively, including any . . . waiver and amendment requests."

At the outset, I note that Comcast filed this motion for a revised schedule before the Public Service Board ("Board") had taken action on its own initiative to expand the scope of this proceeding beyond the relief sought by Burlington Telecom in its amended petition of

September 30, 2009, to include a review of compliance issues.¹ In addition, Comcast filed this motion, which proposes to revise the schedule to delay consideration of Burlington Telecom's requested relief until a later second phase of this proceeding, less than a month after a new scheduling order² was issued based on an apparent agreement among the parties.³

In its Order of January 8, the Board ordered that the scope of the current proceeding "be expanded (i) to include a review of the compliance of Burlington Telecom with its Certificate of Public Good, including all conditions thereof, and with all applicable statutory provisions, and (ii) to consider the possible imposition of penalties for any non-compliance."⁴ Following the entry of the Board's Order expanding the scope of the current proceeding in this docket, the other parties were given until January 22 to respond to Comcast's motion to revise the schedule.

In its memorandum in opposition to Comcast's motion to revise the schedule filed on January 22, 2010, BT opposes the motion on the grounds that granting the motion would delay the ultimate resolution of the matter and would likely waste resources. The Department also opposes Comcast's motion noting, among other concerns with Comcast's motion, that the proposed bifurcation of the current proceeding into two phases would result in a slower process. The Department argues that injecting another round of litigation into the process may itself become a determining factor in BT's prospects.

In its amended petition, BT seeks amendment of Condition 17 of its CPG and temporary relief from the financing limitations of Condition 60 of its CPG. Following the receipt of comments from the parties, the Board expanded the scope of this proceeding to include a review of BT's compliance with its CPG and relevant statutes as well as the possible imposition of penalties. In opposing the opening of a separate investigation docket, the parties indicated that compliance issues were being addressed and could be best addressed in the current proceeding. As all the parties seem to acknowledge, there is a substantial overlap of facts and considerations that would be relevant to an evaluation of the relief requested in BT's amended petition and to an investigation of the nature and extent of BT's violations of its CPG. To now bifurcate this

1. Docket 7044, Order Expanding Scope of Docket of 1/8/10.

2. Docket 7044, Scheduling Order, Ruling on Motion to Intervene and Request for Comments of 11/24/09.

3. See letter filed on November 6, 2009, by Burlington Telecom.

4. Docket 7044, Order Expanding Scope of Docket of 1/8/10 at 2.

proceeding into two phases, as Comcast proposes, to first investigate BT's compliance and then, in a later second phase, address BT's amended petition would introduce additional process to this proceeding and might delay an effective resolution. Accordingly, I deny Comcast's motion to revise the schedule.

Clarification as to Possible Imposition of Penalties

In its response to Comcast's motion to revise the schedule, the Department also raises an issue with respect to the proper application of the cure provision of 30 V.S.A. § 509 to any consideration of penalties in the current proceeding. 30 V.S.A. § 509(b) provides that:

If the board finds that a company has violated any material provision of its certificate or this chapter, it shall allow the company a reasonable opportunity to cure the violation.

The Department "believes that penalties (including CPG revocation) can only be considered after the Board finds violation of a material provision of the CPG or Chapter 13 of Title 30, and BT has had a reasonable opportunity to cure the violation." In a reply filed on February 9, 2010, Comcast supports the Department's request for clarification as to the application to this proceeding of the cure provisions in 30 V.S.A. § 509. Comcast "suggests that no additional time should be provided to BT to effect a cure" because of BT's concession of non-compliance and its awareness of such non-compliance for over a year. Both the Department and Comcast note that resolution of this issue is important to determining the scope of the parties' prefiled testimony, presumably whether such testimony needs to address or recommend penalties.

As the Board indicated in its Order of January 8, the possible imposition of penalties for non-compliance will be within the expanded scope of this docket. However, regardless of the applicability of the cure provisions under 30 V.S.A. § 509 to the current proceeding, the imposition of penalties will not be considered until the completion of the non-compliance investigation and upon a finding of material non-compliance. If the applicable legal thresholds for the imposition of penalties are met, the parties will have a future opportunity to address the issue of penalties. Accordingly, the parties need not address the issue of penalties in their prefiled testimony at this stage of the proceeding, although they may do so.

Deadline for Responses to Motion to Compel Discovery

The Department filed a motion to compel discovery on February 22, 2010. Any responses to this motion must be filed by March 10, 2010.

So ORDERED.

Dated at Montpelier, Vermont, this 26th day of February, 2010.

s/John P. Bentley
John Bentley, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: March 1, 2010

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)